



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

APPEAL FROM ORDER NO. 8 OF 2018

Gajanan S/o. Shankar Ghodgaonkar
Versus
Purushottam Shankar Ghodgaonkar
through LR's and others.

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Mr. Sujit D. Joshi, Advocate for appellant,
Mr. S.V. Dixit, Advocate for respondent Nos. 5,6 and 7

CORAM : S.G. CHAPALGAONKAR, J.

DATE : 24th MARCH, 2025.

ORDER :-

1. Present Appeal from Order impugns the order dated 18.12.2017 passed by District Judge-2, Amalner, District Jalgaon in R.C.A. No. 24 of 2013 by which learned Appellate Court set aside the judgment and decree passed by trial court in R.C.S. No. 167 of 2000 and remanded matter back for trial with certain directions. (For sake of convenience, parties are referred as per their status in suit).

2. Respondent No.1/original plaintiff instituted a suit seeking decree for partition and separate possession in respect of the suit properties contending that defendants are his brothers and sisters. Suit properties are undivided ancestral properties. The father of plaintiff and defendant i.e. Shankar Ghodgaonkar expired in the year 1959. Plaintiff is entitled for partition and separate possession of property. On 22.10.1993 he issued notice to defendant No.1. However, he did not act upon same and consequently, present suit is filed.

3. Original defendant Nos. 2A to 2F and 3 and 4, failed to

appear in the suit in spite of service of notice. Eventually, suit was ordered to proceed ex-parte against them. Defendant No.1/present respondent contested the suit asserting that suit properties are his self acquired properties. During pendency of suit, defendant No.3 namely, Indira Kalamkar and defendant No.4 Sindhu Kulkarni expired. Plaintiff/appellant filed pursis informing the court that there is no necessity to bring her legal heirs on record in view of Order 22 of CPC. Eventually, suit proceeded without bringing their legal heirs and finally decree came to be passed in the suit, thereby determining shares of respective parties on partition.

4. Respondent No.1 assailed the decree passed in suit before District Judge in R.C.A. No. 24 of 2013. During pendency of appeal, legal heirs of defendant No.3 and 4 suo-motu appeared. The appellate court observed that in absence of specific application under Order 22 Rule 4 for exemption from bringing legal representatives of deceased defendant, trial court could not have decreed the suit. Pursis regarding intimation of death with stipulation that LR's of deceased defendants are not necessary to be brought on record, is held to be insufficient compliance for invoking jurisdiction under sub-clause (4) of Rule 4 of Order 22. Accordingly, appellate court remanded matter back to the trial court, directing parties to appear before the trial court on a particular date and permitting plaintiff to submit application for bringing LR's of defendant Nos. 3 and 4 alongwith application for setting aside abatement/condonation of delay, with further direction to expeditiously decide such application and conclude proceeding in the suit.

5. The appellant/original plaintiff assailed aforesaid order in present Appeal From Order.

6. Mr. Sujit Joshi, learned advocate for appellant assails the

order of appellate court contending that the order of remand is absolutely unwarranted in the facts and circumstances of the case. He would submit that Order 22 Rule 4(4), so also, Order 1 Rule 10 of CPC, empowers court to permit addition of any party at any stage of proceeding and grant exemption from bringing LR's of deceased defendant/respondent, in case there was no contest to suit or proceeding by that party. Mr. Joshi would submit that proceeding in the suit for partition is protracted by defendant No.1 by adopting various tactics. According to him, trial court was justified in passing decree in the suit even against deceased defendants in the light of the provisions of Order 22 Rule 4(4). According to him, LR's of defendant Nos. 3 and 4 already came on record of the appeal. They have not challenged decree as passed by trial court. Since trial court has determined the shares of deceased defendant Nos. 3 and 4, no prejudice is caused to their LR's. Both, defendant Nos. 3 and 4, were proceeded ex-parte. Therefore, the decree without bringing their LR's on record, cannot be faulted. Mr. Joshi further contends that in view of Order 1 Rule 10(2) of CPC, even it is assumed that there is non-compliance of Order 22 Rule 4(4), addition of party can be permitted at appellate stage and decree can be passed against or in favour of such party. Mr. Joshi, assails remand of the matter which would unnecessarily prolong lis. Mr. Joshi would further invite attention of this court to the order in W.P. No. 6896 of 2015 to contend that the exercise adopted by appellate court was unwarranted.

7. Per contra, Mr. Dixit, learned advocate for respondent/plaintiff justifies impugned judgment and order of remand passed by appellate court. He would submit that decree against a dead person would be nullity in law. Although defendant Nos. 3 and 4 were proceeded ex-parte in suit, it was incumbent upon plaintiff to bring on record legal heirs upon their death. In a partition suit, plaintiff and defendant both enjoy the status of plaintiff. Decree in absence of

necessary party would also be nullity. Appellate court has rightly concluded that in absence of compliance of order 22 Rule 4(4), the decree as passed by trial court, cannot stand. In support of his contentions, he relies upon the judgment of the Apex court in the matter of *Budh Ram and others vs. Bansi and others 2010 AIR SCW 5071* and in the matter of *Jaladi Suguna vs. Satya Sai Central Trust AIR 2009 Supreme Court 2866* and the judgment of this Court in the case of *“Reliance Consultancy Services vs. Metro Palutan Investment and others reported in (2007) 3 Mh. L.J. 546.*

8. Having considered submissions advanced and reasoning adopted by appellate court in the impugned order, apparently, it is not in dispute that original defendant No.3 and 4 were proceeded ex-parte for want of appearance after service of suit summons. The plaintiff had passed on a pursis before trial court regarding death of defendant No.3 with stipulation that she is ex-parte, LR's need not be brought on record. Consequently, suit proceeded without legal heirs on record. Finally, trial court passed the decree in suit holding that plaintiff and defendant are entitled for partition and separate possession of suit property to the extent of shares as determined. Apart from plaintiff and contesting defendants, share of defendant Nos.3 and 4 has been determined under the decree.

9. It is not in dispute that before appellate court, legal heirs of defendant Nos. 3 and 4 caused their appearance and they are added as parties in appeal. So far as deceased defendant No.3 Indira Kalamkar, vide order below Exh.54, her heirs are taken on record, whereas, defendant No.4 Sindhu Kulkarni, her legal heirs are taken on record vide order passed below Exh.64. As such, before appellate court, they were represented.

10. In the aforesaid background, the only issue that requires consideration in this appeal is, whether the decree passed by trial could have been maintained or the appellate court is justified in remanding the matter back to trial court, with liberty in favour of plaintiff, to follow the procedure for setting aside abatement against deceased respondents and bring on record their legal heirs.

11. The issue revolves around provision of Order 22 Rule 4(4) of CPC, which reads thus :-

“ Sub-rule (4) of Rule 4 of *Order 22 C.P.C.* reads thus:

(4) The Court whenever it thinks fit, may exempt the plaintiff from the necessity of substituting the legal representatives of any such defendant who has failed to file a written statement or who, having filed it, has failed to appear and contest the suit at the hearing; and judgment may, in such case, be pronounced against the said defendant notwithstanding the death of such defendant and shall have the same force and effect as if it has been pronounced before death took place.”

12. The Supreme Court of India in the matter of ***Budh Ram and others vs. Bansi and others (supra)***, observed in para. 12,13 and 14 as under :-

*“12. Abatement takes place automatically by application of law without any order of the court. Setting aside of abatement can be sought once the suit stands abated. Abatement in fact results in denial to hearing of the case on merits. *Order XXII Rule 1 CPC* deals with the question of abatement on the death of the plaintiff or of the defendant in a Civil Suit. Order XXII Rule 2 relates to procedure where one of the several plaintiffs or the defendants die and the right to sue survives. *Order XXII Rule 3 CPC* deals with procedure in case of death of one of the several plaintiffs or of the sole plaintiff. *Order XXII Rule 4 CPC*, however, deals with procedure in case of death of one of the several defendants or of the sole defendants. Sub-clause (3) of Rule 4 makes it crystal clear that **where within the time limited by law, no application is made under sub-Rule 1, the suit shall abate as against the deceased defendant.***

13. Provisions of Order XXII Rule 4 (4) *CPC*, provide that in case, the deceased defendant did not contest the suit and did not file a counter affidavit, the substitution may not be warranted. In the instant case, the High Court repelled the submission regarding application of Order XXII Rule 4(4) *CPC* on the ground that the said provision requires ***the presentation of an application before the Court, before it pronounces its judgment for seeking such a relief and once such an application is allowed, in that case, it can only be taken against the said defendant notwithstanding the death of such defendant and such a decree shall have the same force and effect as if it was pronounced before the death had taken place. This view stands fortified by the Judgments of this Court in Zahirul Islam Vs. Mohd. Usman & Ors. (2003) 1 SCC 476; and T. Gnanavel Vs. T.S. Kanagaraj & Anr. AIR 2009 SC 2367.*** Thus, it has rightly been held by the High Court that the provisions of Order XXII Rule 4(4) *CPC* were not attracted in the facts of this case.

14. In *State of Punjab Vs. Nathu Ram* AIR 1963 SC 89, while interpreting the provisions of Order XXII Rule 4(3) *CPC* read with Rule 11 thereof, this Court observed that an appeal abates as against the deceased respondents where within the time limited by law no application is made to bring his heirs or legal representatives on record. However, whether the appeal stands abated against the other respondents also, would depend upon the facts of a case.”

13. Similarly, aforesaid provision is interpreted by this Court in the case of Reliance Consultancy (supra) wherein, this court, in para. 7 observed thus :-

“Under sub-rule (4) of Rule 4 of Order 22 of the C.P.C. the Court, in its discretion, is empowered to exempt the plaintiff from the necessity of substituting the legal representatives of a deceased defendant who has failed to file a written statement or who having filed it has failed to appear and contest the suit at the hearing. Where the Court exempts a plaintiff from bringing on record the legal representatives of a deceased defendant the judgment that may be passed in the suit may be pronounced against the deceased defendant notwithstanding his death and shall have the same force and effect as if it has been pronounced before the death took place. It may be noted that sub-rule (4) does not say that in every case where the deceased defendant had not filed the written statement or after having filed the written statement had failed to contest the suit, the plaintiff would be exempted from the necessity of

substituting the legal representatives. It only permits a plaintiff to make a request to the Court, seeking exemption and the Court, exercising judicial discretion, can grant such exemption. Needless, to say that the discretion is to be exercised by the Court judicially for granting or refusing to grant the exemption as requested by the plaintiff.”

14. This court in continuation of aforesaid exposition of law, further observed that exemption can be granted even after abatement order is passed and as such, abatement would not be a barrier in exercising such jurisdiction by court.

15. In present case, it is not in dispute that specific application seeking exemption from bringing LR's of deceased defendants was never filed before trial court. The pursis at Exh.84 was filed in respect of death of defendant No.3 Indira Kalamkar, stating that since defendant No.3 was proceeded ex-parte there is no necessity to bring her legal heirs on record. This pursis can never be treated as application to exercise discretion under sub-rule(4) of Rule (4) of Order 22 of C.P.C. The appellate court has rightly observed in this regard. Apparently, before passing decree the trial court has not exercised discretion granting exemption from bringing LR's of deceased defendants on record. It is true that trial court has determined the shares of defendant Nos. 3 and 4, but no share is granted to them in house properties and business of joint family property. Fact remains that decree against defendant Nos. 3 and 4 would not be sustained being against dead person for want of specific exemption under Order 22 Rule 4(4). It is difficult to overcome aforesaid technical defect even though LR's of deceased defendant Nos. 3 and 4 appeared in appeal. In this background, judgment and order passed by appellate court thereby remanding matter to trial court cannot be faulted.

16. In the result, Appeal From Order is dismissed. However, respective dates for appearance of parties and filing of application for bringing LRs or setting aside abatement, as mentioned in clause (3) of judgment of appellate court, are extended by six weeks from today. Rest of the order passed by appellate court is maintained as it is.

Pending civil application stands disposed off.

[S.G. CHAPALGAONKAR, J]

grt/-